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No. 1069

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

MILTON M. CLELAND and GLADYS G. CLELAND,
Petitioners,

v.

GRAYBAR ELECTRIC COMPANY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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DESIGNATION OF CORPORATE RELATIONSHIPS

Graybar Electric Company, Inc., filing this Brief in Opposition to Petition for Certiorari, as respondent in this proceedings, states that:

A. This is its original Designation of Corporate Relationships.

B. Graybar Electric Company, Inc. is not owned by a parent corporation.

C. Graybar Electric Company, Inc. does not have any ownership interest in any subsidiaries, excepting only wholly-owned subsidiaries.

D. Graybar Electric Company, Inc. does not have any affiliates.

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COUNTERSTATEMENT OF THE CASE

The Clelands'[1] statement of the case omits some important facts. These include (a) the language in the contract upon which the court relied in entering judgment in favor of Graybar, (b) a quotation of the discovery requests and Graybar's objections thereto on the ground that they were irrelevant, vague, indefinite and overly broad, (c) a statement to the effect that all correspondence by and between the parties and all correspondence relating to the Cleland claim had been produced during discovery, and (d) the fact that in contravention

1. Throughout this brief, "the Clelands" refers to the petitioners, Milton A. Cleland and Gladys G. Cleland, and "Graybar" refers to the respondent, Graybar Electric Company, Inc.

of a Local Rule of court, counsel for the Clelands failed to confer with counsel for Graybar prior to filing a motion to compel further answers to discovery requests.

SUMMARY OF ARGUMENT

This is not an appropriate case for the grant of *certiorari* because there are no compelling reasons for a review by this Court of the two rulings of the district court which are contested by the Clelands. These are the district court's striking of their jury trial demand and its denial of their motion to compel further responses to discovery. Neither of these matters involves any significant federal or public issue.

ARGUMENT

A. The Jury Trial Issue

The denial by the district court of a jury trial was based on two independent reasons. One reason was that the Clelands waived their right to a jury trial. That conclusion had nothing to do with the other reason which involved the unavailability of jury trials in ERISA cases. (See 18a).

The district court found that the Clelands had waived their right to demand a jury trial because their demand was not made within the time provided by Fed. R. Civ. P 38(b). The Clelands' demand for a jury trial was first made by endorsement on their motion to amend their Complaint, which was filed several months after their original Complaint and the Answer thereto had been filed.

The filing of an amended pleading does not give rise to the ability of either party to demand a jury trial when such a demand has been previously waived, unless the amended pleading raises new factual issues triable by a jury. *Walton v. Eaton Corp.*, 563 F.2d 66, 71-72 (3d Cir. 1977). In this case, no new factual issues were alleged

by the amended pleading. Mrs. Cleland admitted this fact in her memorandum of law in support of her motion for leave to amend the Complaint when she said:

> These amendments are based upon the same facts and circumstances as the original Complaint.
>
> . . . .
>
> [T]he Amended Complaint only clarified the legal basis for their rights and the type of damages [p]laintiffs claim.

The addition of Mr. Cleland as a party-plaintiff in the Second Amended Complaint did not give rise to a right to demand a jury trial because no new factual issues were raised. *Commonwealth of Pa. Ex. Rel. Feiling v. Sincavage,* 439 F.2d 1133, 1134 (3d Cir. 1971).

Another reason for the inappropriateness of a jury trial in this case is that there were no issues of fact for a jury to decide. At the trial there was a dispute relating to background facts because at that time there was an issue as to whether the "arbitrary and capricious" standard of review should be used by the district court. However, those factual issues were rendered moot by this Court's decision in *Firestone Tire & Rubber Co. v. Bruch,* 4879 U.S. __, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1989) which was published after the trial in this case, but before the district court's opinion. Although the district court applied the *de novo* standard, it still held in favor of Graybar.

In their Petition, the Clelands suggest that the demand for damages set forth in their Second Amended Complaint raised an issue triable by a jury. (p. 8 of Petition) However, the Second Amended Complaint only sought declaratory judgments which, among other things, asked the district court to declare that Graybar "is legally obligated . . . to reimburse plaintiff for expenses incurred for such services . . ." In the original Complaint, Mrs. Cleland asked the district court to

declare that Graybar "is legally obligated to offer plaintiff health insurance coverage".

All of the Clelands' Complaints sought essentially the same relief – that is, a declaration of liability against Graybar and a penalty. Finally, damages were a non-issue in this case because the parties stipulated the amount of money which the Clelands were entitled to receive if there was coverage.

The basic issue in this case involved the interpretation of Graybar's Summary Plan Description, a written document. Federal law has long prescribed that contract interpretation is a matter for court determination and is not for a jury. *Rossville Salvage Corp. v. S. E. Graham Co.,* 319 F.2d 391 (3d Cir. 1963); *Federal - Mogul Corp. v. N.L.R.B.,* 566 F.2d 1245 (5th Cir. 1978).

B. The Discovery Issue

The Clelands have not set forth the factual or procedural basis for their complaint about the district court's denial of their motion to compel further discovery. They have not quoted Graybars' objections to what it contended were irrelevant, vague and overly broad discovery requests. It is also important that all correspondence between the parties or which related to the claim was produced in discovery. it was that kind of evidence which was considered in *Schultz v. Metropolitan Life Ins. Co.,* 872 F.2d 676 (5th Cir. 1989), a case upon which the Clelands rely.

The conduct of discovery is committed to the sound discretion of the district court. *Stich v. United States,* 730 F.2d 115, 117-118 (3d Cir. 1984), *cert. denied,* 469 U.S. 917 (1984); *In re Fine Paper Antitrust Litigation,* 685 F.2d 810, 817 (3d Cir. 1982), *cert. denied,* 459 U.S. 1156 (1983). To obtain a reversal of a district court's order denying a motion to compel, the complaining party must show that the denial resulted in "actual and substantial prejudice". *Otis Clap & Son, Inc. v. Filmore*

Vitamin Co., 754 F.2d 738, 734-44 (7th Cir. 1985). The Clelands have failed even to address this requirement. They do not even set forth the discovery particulars which were involved.

The Clelands also do not comment about their counsel's failure to comply with Local Rule 24(f) of the United States District Court for the Eastern District of Pennsylvania which states that:

> No motion . . . pursuant to the Federal Rules of Civil Procedure governing discovery . . . should be made unless it contains a certification of counsel that the parties after reasonable effort are unable to resolve the dispute.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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